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July 23, 1997

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*Via Hand Delivery*

**Mr. William F. Caton**  
**Secretary**  
**Federal Communications Commission**  
1919 M Street, NW, Room 222  
Washington, DC 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

**Re: Annual Assessment of the Status of Competition in Markets for the Delivery of  
Programming; Comments of the Small Cable Business Association; CS Docket  
No. 97-141**

Dear Mr. Caton:

We enclose for filing an original and 4 copies of the Comments of the Small Cable Business Association in the above-referenced matter. Also enclosed is a copy to date-stamp and return to the courier in the pre-addressed Federal Express envelope.

Very truly yours,

**Howard & Howard**



**Eric E. Breisach**

EEB:cm

Enclosures

cc: Matthew Polka, Esq.  
Meredith J. Jones, Chief, Cable Services Bureau  
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**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

**In the Matter of**

**Annual Assessment of the Status of  
Competition in Markets for the  
Delivery of Video Programming**

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**CS Docket No. 97-141**

**DOCKET FILE COPY ORIGINAL**

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**JUL 23 1997**

**FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY**

**COMMENTS OF THE  
SMALL CABLE BUSINESS ASSOCIATION**

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**July 23, 1997**

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## Summary

"Toto, we're not in Kansas any more" sums up the changes small cable has experienced

during the past 12 months. 1997 has seen profound changes in the competitive landscape for small cable. Small cable systems still make up almost three quarters of the cable systems in the country,

Other major programmers steadfastly continue their refusal to deal with the cooperative, claiming lack of vertical integration. If competition is to exist in rural markets, small cable must have access to volume pricing by all programmers through dealings with buying groups. Consequently, the Commission should extend all program access requirements to non-vertically integrated programmers if it is to foster sustainable competition in rural America.

Small cable also continues to incur stiff pole attachment rate increases on unregulated attachments. Two-thirds of SCBA members responding to a pole attachment rate survey indicated rates above the national average. Pole attachment issues remain a grave concern to SCBA. SCBA urges the Commission to recommend regulation of all attachments to curb the abuses currently occurring.

Despite the significant cost pressures imposed by high programming costs and pole attachment increases, small cable has held the line on rate increases. In the face of significant rate deregulation, almost half of SCBA members responding to its survey indicated that they did not increase rates during the year after passage of the 1996 Telecommunications Act. Of those that raised rates, the annual rate of increase averaged only 1.8%. Small cable has provided leadership in price restraint.

Small cable faces many challenges. Constant change of the competitive landscape requires change in governing statutes and regulations in order to facilitate robust and long-term competition.

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

<b>In the Matter of</b>	)	
	)	
<b>Annual Assessment of the Status of</b>	)	<b>CS Docket No. 97-141</b>
<b>Competition in Markets for the</b>	)	
<b>Delivery of Video Programming</b>	)	

**COMMENTS OF THE  
SMALL CABLE BUSINESS ASSOCIATION**

**I. INTRODUCTION**

The last year has seen profound changes in the competitive landscape for the delivery of video programming services that threaten to seriously and adversely affect rural areas served by small cable. As the only voice solely dedicated to the interests of small cable, the Small Cable Business Association ("SCBA") provides evidence to the Commission of the need for changes in the regulations and statutes in order to preserve competition in the face of rapidly escalating consolidation among video programming providers.

**II. SMALL CABLE RATES HAVE NOT RISEN SIGNIFICANTLY**

The *Notice* asks for explanations regarding significant increases in cable television rates.<sup>1</sup> SCBA cannot shed light on the reason for the increases, because a survey of its members reveals that small cable did not significantly raise rates in the year following passage of the

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<sup>1</sup>*Notice of Inquiry*, In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, CS Docket No. 97-141 ("Notice") at ¶ 7(g).

Telecommunications Act of 1996. The following statistics demonstrate the significant price restraint exercised by small cable:

- ◆ **Almost half took no rate increase.** A survey of SCBA members reveals that of those members responding, almost half took no rate increase at all during the year following passage of the 1996 Act.<sup>2</sup>
- ◆ **Those that raised rates had increases well below industry averages.** Of those members who raised rates, the average increase was 3.9% and the amount of time since their last increase averaged 24.9 months. On an annual basis, this increase amounts to only 1.88%.

The price restraint shown by SCBA members was somewhat surprising, even to then SCBA Chairman David Kinley:

“The reason I find the results surprising,” Kinley said, “is because we didn’t promise our supporters in Congress that rates wouldn’t go up, or even that they wouldn’t go up significantly.”

“What we promised was that rates would reflect our renewed or improved ability to attract capital to upgrade and expand our systems in rural and small town America, and to add new services and technologies over time. It now appears we were able both to control rates and attract new capital.”<sup>3</sup>

Small cable sought deregulation in order to remove barriers to the capital markets, not simply as a vehicle to raise customer rates. The Commission responded by granting small cable wide latitude in rate setting under Form 1230.<sup>4</sup> Congress responded by granting wide-spread deregulation of

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<sup>2</sup>46%.

<sup>3</sup>SCBA Press Release dated April 18, 1997.

<sup>4</sup>In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition act of 1992: Rate Regulation, *Sixth Report and Order and Eleventh Order on Reconsideration*, MM Docket Nos. 92-266 and 93-215 (released June 5, 1995) (“*Small System Order*”).



certain small cable rates.<sup>5</sup> Small cable has acted responsibly and with significant restraint in light of deregulation.

### **III. THE FACE OF DBS COMPETITION CONTINUES TO CHANGE**

#### **A. DBS Continues Rapid Growth**

As noted in the *1996 Competition Report*, DBS providers signed up new customers at astronomical rates.<sup>6</sup> The rapid growth removes DBS from the status of a “fledgling industry” as the Commission had identified DBS providers in the past.<sup>7</sup>

Published reports indicate strong DBS subscriber growth in the first six months of 1997, with DBS picking up about 940,000 new subscribers<sup>8</sup>, or an annualized growth rate of almost 40%. Of these new subscribers, DirecTV led the way with 415,000 subscribers, followed by Primestar with 252,000 and Echostar with 240,000 new net subscribers.<sup>9</sup>

#### **B. Major media companies focus on DBS opportunities.**

In recent years, DBS has drawn the attention of the largest media and telecommunications companies in the world. Consider DirecTV's recent partnering with AT&T. Consider the recently restructured Primestar venture owned by TCI, Time Warner, MediaOne, Cox, Comcast and GE American Communications and the attempt to add News Corporation as an owner.<sup>10</sup> DBS providers,

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<sup>5</sup>47 U.S.C. § 543(m)(1) and (2)

<sup>6</sup>*Third Annual Report*, In the Matter of the Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, CS Docket No. 63-133 (released January 2, 1997) (“*1996 Competition Report*”) at Appendix C, Tables 1 and 2.

<sup>7</sup>8 FCC Red 1589 at 1596 (1993).

<sup>8</sup>*DBS Growth Continues*, Cable World, Vol. 9, No. 27, July 7, 1997 at 6.

<sup>9</sup>*Id.*

<sup>10</sup>*Primestar Transitions To Publicly Traded Company; News Corp. To Acquire Stake*, Communications Today, June 12, 1997.

once an underdog needing regulatory protection have merely become another outlet for the programming product of large media concerns.

Small cable has always had difficulty procuring programming on favorable terms from most large programmers. It now faces a new set of challenges as the owners of many of these programming sources seek to compete directly with small cable.<sup>11</sup> As discussed later in these comments, the increasing concentration both within the ranks of programmers and between programmers and distributors causes significant concerns for small cable's long-term ability to compete in the absence of changes to the program access rules that ensure long-term access to programming.

**C. DBS Regulations Fail to Impose Regulatory and Financial Parity, Resulting in Unfair Competition**

DBS operators provide a generic national service, devoid of local programming. Consequently, they can provide service at a much lower cost. DBS can only accomplish this if the Commission continues to exempt DBS from both: (1) local program carriage requirements; and (2) restrictions mandated by Congress to limit the amount of harm inflicted on localism.<sup>12</sup>

SCBA has set forth comprehensive proposals to establish regulatory and financial parity. These proposals would result in a competitive playing field while simultaneously satisfying important public policy objectives articulated by Congress and this Commission, including the preservation of local programming. To establish regulatory parity, DBS providers must satisfy must-carry requirements or otherwise contribute to a fund in each community to support local programming

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<sup>11</sup>Primestar has announced that it will "aggressively pursue cable" and that it has shelved its "Cable-Plus" plan to "marry its DES system with rural-based cable systems that are not cost effective to upgrade." *Electronic Media*, June 16, 1997.

<sup>12</sup>47 U.S.C. § 335(a).

providers. This fund would help offset the financial harm inflicted by DBS on local programmers as a result of DBS' inability to carry local broadcast, PEG access and other local programming. SCBA has outlined its comprehensive proposals in its comments filed April 28, 1997 in Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992, Direct Broadcast Satellite Service Obligations, MM Docket No. 93-25. SCBA incorporates these comments by reference and appends them behind Tab "A."

**D. DBS Operators Often Use Unscrupulous and Illegal Methods to Compete**

DBS' rapid growth arises in part from questionable marketing practices. SCBA members have witnessed with increasing frequency during the past year unscrupulous and illegal methods used by some DBS operators to sign up subscribers. SCBA brings a number of these practices to the Commission's attention below.

**1. Making distant network signals available in areas served by local network signals**

SCBA members have witnessed some DBS providers offering delivery of distant network signals in areas where the local signal remains readily receivable off-the-air. This practice violates the Satellite Home Viewer Act ("SHVA"). Two recent proceedings have highlighted these violations. The first involves a lawsuit brought against one satellite provider, PrimeTime 24, by broadcasters alleging widespread violations of SHVA. The second involves a Copyright Office proceeding to consider changes to the SHVA. In the latter proceeding, the National Association of Broadcasters

presented compelling evidence of widespread violations of the SHVA in major markets where local affiliate signals should be readily available off-the-air.<sup>13</sup>

## **2. Unscrupulous solicitations**

SCBA members have witnessed an alarming increase in certain door-to-door and telephone sales tactics by DBS providers. These solicitors often target unsophisticated, lower income cable subscribers. In typical door-to-door transactions, DBS agents may misrepresent that current cable customers can “save” on their monthly cable bill by purchasing a dish. Agents then ask the consumer to fill out an “application” to “determine how much money they can save on their cable service.”

The applications are actually consumer credit applications. Agents often do not tell the consumer that the application opens a consumer credit line. Agents may fail to disclose that programming is not “free” but charged to the credit line. Agents may fail to inform the consumer of credit provisions, such as interest rates and payment terms.

Another approach involves a direct call on the consumer in which the DBS agent tells the consumer that the cost of cable will skyrocket with the introduction of digital television. Consumers are told they can avoid these increased costs by purchasing dish equipment.

## **3. Even the United States Postal Service publications contain potentially misleading advertising**

DBS providers advertise a cable operator referral service for people wanting to sign up for cable. Numbers used by these services include 1-800-CABLETV and 1-800-NUCABLE. The advertisements imply that the service will refer the caller to the local cable television provider. In

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<sup>13</sup>Comments and Testimony of the National Association of Broadcasters, In the Matter of Revision of the Cable and Satellite Carrier Compulsory Licenses; Public Meetings, Docket No. 97-1. Excerpts of the DBS customer location maps are enclosed behind Tab “B.”

reality, the referral service typically routes callers to a DBS provider. SCBA members have called this number repeatedly and have found that only participating cable operators receive referrals and that this service, which is not advertised to independent cable operators, consists primarily of the MSOs that own Primestar.

SCBA members have made repeated inquiries to determine how they could become participating members in this service. They have been told, when pressed, that they can join the referral service, provided that they pay a substantial recurring retainer for services and provide the referral service -- whose primary sponsors are the largest MSO's who own Primestar -- with a complete customer list, including zip codes. This raises significant competitive concerns. In addition, the characterization of this service as a national cable referral service constitutes a substantial misrepresentation. Worse yet, the referral service receives prominent display in the United States Postal Service's Mover's Guide that is distributed in almost 50,000 Post Offices across the United States.<sup>14</sup>

These practices warrant monitoring by the Commission and possible corrective action.

#### **IV. THE COMMISSION MUST MODIFY ITS PROGRAM ACCESS RULES TO PRESERVE SMALL CABLE'S ABILITY TO COMPETE**

##### **A. Not All Cable Operators Hold Affiliations with Large MSOs**

Most small cable operators have no affiliation with large MSOs. The consolidation that proliferates in the rest of the cable industry operates on a different plane than does small cable. Because consolidation generally does not impact small cable, SCBA estimates that 7,343 independently owned and operated cable systems continue to provide service to rural America.

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<sup>14</sup> A copy of the advertisement from the 1996 Mover's Guide is enclosed as Tab "C."

System Description	Number of Systems	Percent of Total
Under 15,000 Independently Owned	7,343 <sup>15</sup>	66%
Under 15,000 MSO Owned or Affiliated	2,203 <sup>16</sup>	19%
Over 15,000	949 <sup>17</sup>	9%
Information not Available	631 <sup>18</sup>	6%
Total	11,126 <sup>19</sup>	100%

These small and independently owned cable systems face substantial challenges as they must attempt to purchase their primary product, programming, at fair rates, terms and conditions from some of the largest media companies in the world. Of even greater concern, is that several of these media forces currently own and control a DBS provider.

Program costs represent 35-40% of a typical SCBA member's operating budget. Because small cable pays substantially higher programming costs than large MSO's or than systems owned by vertically integrated programmers, small cable incurs substantially higher programming costs when measured on a per subscriber basis. The Commission has recognized the unique burdens that result in high per subscriber costs and has attempted to mitigate them. The Commission must exercise the same care with respect to ensuring program costs that are reasonable on a per subscriber basis.

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<sup>15</sup>Total number of systems multiplied by 66% (11,126 x 66%).

<sup>16</sup>Total small systems less those independently owned (9,546 - 7,343).

<sup>17</sup>*Warren's Television and Cable Factbook*, Vol. 64 at I-81.

<sup>18</sup>*Id.*

<sup>19</sup>*Id.*

**B. Horizontal Consolidation of Programmers Has Created an Oligopolistic “Programming Cartel”**

A successful cable operator must offer a core of established programming services. The vast majority of these programming services are owned by a handful of media conglomerates. Consider the following examples of major media companies and some of the programming services in which they hold at least an attributable, if not controlling interest:

- ◆ **Time Warner** - HBO, Cinemax, CNN, Headline News, CNN-SI, Cartoon Network, Turner Classic Movies, TNT, TBS, Sega Channel, E! and Comedy Central.<sup>20</sup>
- ◆ **TCI** - Black Entertainment Television, Video Jukebox Network, Home Shopping Network, Encore, Starz!, Discovery Channel, Learning Channel, Animal Planet, Discovery Kids, Bravo, Independent Film Channel, American Movie Classics, Romance Classics, Madison Square Garden Network, SportsChannel (various regions), and MuchMusic.<sup>21</sup>
- ◆ **Disney** - Disney Channel, ESPN, ESPN2, Lifetime, A&E, History Channel and ABC television.<sup>22</sup>
- ◆ **News Corporation (Fox)** - FX, Fox Movies, Request TV, Fit TV, Family Channel and Fox television.<sup>23</sup>
- ◆ **USA Network** - USA and Sci-Fi channels.
- ◆ **Group W** - Nashville Network, Country Music Television and Eye on the People.

These six companies control significant amounts of programming.

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<sup>20</sup>Goff, Leslie, *Guide to U.S. Program Network Connections*, Multichannel News International, October 1996.

<sup>21</sup>*Id.* (disclosures assume that TCI purchases a percentage of Rainbow Programming's equity).

<sup>22</sup>*Id.*

<sup>23</sup>*Id.*

**C. Vertical Consolidation of Most “Programming Cartel” Members and a Single DBS Provider Makes Small Cable’s Ability to Use Program Access Rules Critical**

Consolidation of News Corporation and its Fox services into the Primestar DBS venture will significantly further consolidation of program providers into a direct competitor with small cable. In light of the proposed merger, the new Primestar has publicly declared its intent to compete directly with cable. Given that Primestar will not likely compete against its owners’ services, small cable and other independently owned and operated cable systems will bear the brunt of Primestar’s competitive efforts.

Competition against the merged Primestar will prove difficult unless small cable has access to programming at rates, terms and conditions comparable as to large operators, including those that own Primestar. The concerns for access to programming run not only to satellite programming of vertically integrated providers, but also to off-air programming. Cable programming entities will control two of the major broadcast networks and will be able to exert significant pressure on small cable by tying retransmission consent to satellite programming purchase requirements.

In addition to the ability to procure rights to carry individual channels, SCBA has concerns that the programmers will eventually require block purchasing of some or all of a programmer’s services as a precondition to receiving the right to purchase the most desirable signals. Such practices could raise significant barriers to the ability of channel-locked small systems to obtain popular programming. The Commission should consider raising this issue as one needing Congressional attention when it reports to Congress.



**D. Concentration of Programmers into DBS Providers Mandates Immediate Changes to the Program Access Rules**

**1. The current program access rules artificially limit the type of programming subject to the access rules**

The Commission's current program access rules limit the term "satellite cable programming" to:

Video programming which is transmitted via satellite and which is primarily intended for direct receipt by cable operators for their retransmission to cable subscribers, except that such term does not include satellite broadcast programming.<sup>24</sup>

The growing vertical integration of DBS providers with "cable" programmers raises concerns with SCBA that DBS providers will argue that the program access provisions do not apply to their program procurement practices because the programming is primarily intended for distribution to DBS, not cable customers. This limiting interpretation undercuts the goal of Congress -- competitive access to programming provided by vertically integrated programmers.<sup>25</sup>

Similarly, the Commission's current interpretation would allow programmers vertically integrated with DBS providers to deny small cable access to its programming. Consequently, a large media company that operates DBS could deny small cable access to its programming because the programming is not "primarily intended for direct receipt by cable operators." Congress intended to facilitate competition among video programming providers when it enacted the program access rules.<sup>26</sup> The vertical integration of DBS providers with major program suppliers should cause the

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<sup>24</sup> 47 C.F.R. § 76.1000(h).

<sup>25</sup> 47 USC § 548(b).

<sup>26</sup> *Conference Report* at 92 ("The House amendment makes it unlawful for a cable operator or satellite cable programming vendor affiliated with a cable operator to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or prevent any multichannel video programming distributor from providing satellite cable programming to subscribers or consumers.")

Commission to recommend to Congress the need to broaden the program access rules to include programming provided to all multichannel video programming distributors.

**2. The current program access rules provide no benefit to small cable**

Participation in buying groups to receive volume discounts on programming represents the only benefit small cable can possibly receive through the current application of the program access rules. The Commission has rendered this potential benefit essentially meaningless by imposing strict joint and several liability rules that some programmers assert disqualify the only major cable buying cooperative, the National Cable Television Cooperative ("NCTC"). Because no cable buying cooperative, to the best of SCBA's knowledge, requires joint and several liability of its members, the ability to receive the volume discounts afforded DBS and other large competitors remains elusive for small cable.

**3. The only major buying cooperative has operated successfully for 15 years without requiring joint and several liability**

The Commission understandably sought to minimize the default risk potentially associated with buying groups. The Commission distinguished between those buying groups that: (1) contract directly with the programmers and assume the contractual payment obligation; and (2) contract on behalf of their members and the members agree to joint and several liability of programming costs.<sup>27</sup>

The only major buying cooperative, NCTC, appears to fall within the first category in that it contracts directly with programmers and assumes responsibility to pay programmers. Nevertheless, certain programmers have refused to deal with NCTC because it does not require joint and several liability amongst its members. SCBA continues to investigate this conduct and plans to bring it to

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<sup>27</sup>47 C.F.R. § 76.1000(c)(1).

the Commission's attention in the immediate future. SCBA strongly suspects that certain programmers continue to use the absence of joint and several liability as a shield to avoid any requirement to deal with a large buying cooperative.

In all events, the size and strength of NCTC obviates the need for joint and several liability. Using its accumulated reserves, NCTC pays programmers in advance on behalf of its members. By doing this, NCTC assumes the default risk of its members. NCTC's payment provides a more certain cash flow to programmers than if they individually dealt with a large MSO that might stagger its payments to programmers or choose to not pay the weaker programmers. Dealing with NCTC gives all programmers greater security than dealing with a comparably sized MSO. No need for joint and several liability exists from a practical or legal perspective.

**4. The Commission should remove joint and several liability requirements where the buying cooperative maintains adequate financial reserves**

In all cases, the Commission should revisit its program access rules, including its rules regarding buying cooperatives. The Commission's rules should accomplish no more than equating the risk to a programmer of dealing with a buying cooperative to that of dealing with a comparably sized MSO. The Commission's current rules impose onerous requirements that make dealing with a buying cooperative less risky than dealing with an MSO.

NCTC is an established cooperative owned by its 837 member companies that operate about half the cable systems in the nation (5,300 systems). NCTC significantly reduces programming costs for about 7.5 million cable subscribers. In April 1997, NCTC paid programmers about \$12 million on behalf of its members. NCTC retains significant cash reserves as well as commercial lines of credit to ensure its ability to pay programmers, even in the extremely unlikely event of significant and

simultaneous member payment default. NCTC has paid programmers promptly for the past 15 years -- 180 months of payment without exception. NCTC has absorbed all member non-payments over that same time period.

No valid public policy reason exists to allow programmers to refuse to deal with a buying cooperative with the size, track record and financial resources of NCTC. Nevertheless, as noted below, major programmers do just that. These refusals to provide small cable buying groups with volume discount opportunities flies in the face of the intended purpose of both the program access statute and the Commission's goals in its rulemakings.

**E. The Commission Should Strengthen Rules to Prevent Programmers from Refusing to Deal with Small Cable Buying Cooperatives**

Three major programming groups steadfastly refuse to deal with NCTC, citing either lack of vertical integration with a cable operator or the absence of joint and several liability among NCTC members:

1. The Disney Company (A&E, Disney, ESPN and Lifetime)<sup>27</sup>
2. CBS/Westinghouse (Country Music TV, Nashville Network, Eye on the People)<sup>28</sup>; and
3. VIACOM/Seagram (USA Network).

At least two of these programmers have positioned themselves with distributors that compete directly with cable. CBS delivers programming through one of the largest broadcast television networks. Disney reportedly has arrangements with Ameritech New Media, a telephone company

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<sup>27</sup> July 27, 1993 ESPN letter. (See Tab "D")

<sup>28</sup> June 1, 1995 Group W Satellite Communication letter. (See Tab "E")

overbuilder of traditional cable providers, to develop unique and exclusive programming that may trigger vertically integrated status. Comprehensive program access rules should not allow these competing vertically integrated providers to easily escape the buying group mechanism that helps level the playing field.

To provide a truly competitive market for video programming services, the Commission should expand the program access rules to all satellite delivered programming, allowing small cable access to all programming services through the use of a buying cooperative at rates competitive with those paid by DBS providers.

## **V. UNREGULATED POLE ATTACHMENTS REMAIN A SIGNIFICANT PROBLEM FOR SMALL CABLE**

### **A. The Pole Attachment Act**

The Pole Attachment Act enacted by Congress in 1978 confers authority upon the FCC to regulate pole attachment rates, terms and conditions under a "just and reasonable" standard.<sup>29</sup> The Pole Attachment Act carves out an important exception to Commission jurisdiction. The Commission cannot exert jurisdiction over poles owned by state or municipal utilities, cooperatives or railroads.<sup>30</sup> The Commission seeks comment on the effect of this exemption upon competition, especially in rural areas.<sup>31</sup>

Small cable operators often provide service in rural areas and must utilize existing poles owned by rural cooperatives and municipalities. Consequently, the exemption afforded rural

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<sup>29</sup> 47 U.S.C. § 224, *et seq.* (the "Pole Attachment Act").

<sup>30</sup> 47 U.S.C. § 224(a)(1).

<sup>31</sup> Notice at ¶ 20.

cooperatives and municipalities especially impacts small cable. SCBA comments upon the competitive impact of the exemption.

**B. Competitive Impact of Pole Attachment Fees Upon Small Cable**

**1. Small Cable Cost Structures**

SCBA and its members have confronted major hurdles in their efforts to control costs. For example, small cable has difficulty negotiating equitable rates for programming because of unequal bargaining power. Small cable typically pays significantly higher programming costs than larger operators. Broadcasters have followed this same pattern in their pricing of retransmission consent.<sup>32</sup> In other proceedings, SCBA has alerted the Commission to the disparate cost burdens of small cable. The Commission has responded by relieving small cable of many regulatory burdens and adopting special protections to ensure the viability of small cable systems.

Pole attachment rates, however, remain an area in which small cable pays far more than large cable operators. Moreover, small cable's other chief competitors, DBS operators, pay no pole attachment fees at all. Consequently, small cable operators and their subscribers have become especially vulnerable to excessive pole attachment rates.

**2. Pole Attachment Fees Have a Disparate Impact Upon Small Cable**

Even if small cable operators could secure the same pole attachment rates as large MSOs their relative per subscriber cost remains far greater due to lower subscriber density. In its *Small System Order*, the FCC recognized that subscriber density of small systems is nearly half that of larger

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<sup>32</sup> *Written Testimony of the Small Cable Business Association*, Docket No. 97-1, p. 6.

systems.<sup>33</sup> Most SCBA members have far fewer than 15,000 subscribers<sup>34</sup> and subscriber densities well below the average recited by the FCC. The bottom line: small cable companies must string more cable plant to reach fewer subscribers.

When the Michigan Public Service Commission ("MPSC") recently lowered Michigan's pole attachment rates, Colleen McNamara, Executive Director of the Michigan Cable Telecommunications Association, said the decision "has the greatest impact on rural members . . . . When a cable system passes more cows than houses, the expense they incur in just attaching to poles adds up in a hurry."<sup>35</sup>

Excessive pole attachment rates have tremendous impact upon small cable operators. The following chart illustrates the impact of lower subscriber density on identical pole attachment costs when measured on a per subscriber basis:

<b>Poles Per Mile of Cable Plant</b>	<b>Pole Cost Per Mile (\$4 Rate)</b>	<b>Population Density<sup>36</sup> (Homes Per Mile)</b>	<b>Penetration Rate</b>	<b>Subscribers Per Mile</b>	<b>Pole Cost Per Subscriber</b>
40	\$160	100	70%	70	\$ 2.29
40	160	20	70%	14	11.43

Small cable cannot afford to pay excessive pole attachment rates. By virtue of limited subscriber base and high cost structure, small cable starts out at a competitive disadvantage. The statutory exemption exacerbates the problem. The Commission has recognized the necessity of

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<sup>33</sup> "The average number of subscribers per mile is 35.3 for systems with fewer than 15,000 subscribers and 68.7 for systems with more than 15,000 subscribers." *Small System Order*, ¶ 27.

<sup>34</sup> More than 8,000 systems—almost three-quarters of all cable systems—have less than 3,500 subscribers. *Warren's Television and Cable Fact Book*, Vol. 64, p. I-81.

<sup>35</sup> Multichannel News, No. 7, Vol. 18, p. 22 (2/17/97).

<sup>36</sup> For illustrative purposes, we used urban and rural population density estimates from a recently published news source. Multichannel News, No. 7, Vol. 18, p. 22 (2/17/97).

crafting public policy in a way that does not impose high per-subscriber costs on small cable.<sup>37</sup>

SCBA strongly urges the Commission and Congress to consider the impact of the § 224(a)(1) exemption upon small cable operators as illustrated in the following sections.

**C. Small Cable Operators Pay Excessive Pole Attachment Rates to Rural Cooperatives and Municipalities and to Pole Owners in States that Refuse to Adopt the Commission's Rate Formula.**

In October 1996, SCBA surveyed its members regarding pole attachment rates. Those SCBA members with aerial plant leasing space from cooperatives or municipalities reported annual pole attachment rates ranging from \$1.50 to \$13.40. On average, SCBA members reported rates of \$5.66 per pole, well in excess of the \$4.73<sup>38</sup> national pole attachment rate average. The following chart summarizes the SCBA survey results:

Rate Range	Percentage Response
\$1.00 - \$2.00	4%
\$2.10 - \$4.73 (National Average)	30%
\$4.74 - \$6.00	38%
\$6.01 - \$8.00	17%
\$8.01 - \$10.00	6%
\$10.01 +	5%
Total	100%
Above National Average	66%

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<sup>37</sup> *Small System Order*, ¶ 56.

<sup>38</sup> This amount is based on a 1995 pole rate survey. Michigan Public Service Commission Case No. U-10831, Exhibit I-55. The same survey identified an average pole attachment rate of \$3.71 for states computing pole attachment rates under the FCC methodology.



Two-thirds of responding SCBA members pay rates to rural cooperatives and municipalities in excess of national averages. SCBA members also pay significantly higher rates in some states that refuse to regulate rates in accordance with the Commission's methodology. Despite paying higher rates initially, SCBA members report a high frequency of encountering pole owners who seek even higher rates. The following chart illustrates the disparity in rates<sup>39</sup>:

SCBA Survey	All States	FCC Jurisdiction	States Using FCC Method
\$5.66	\$4.73	\$4.22	\$3.71

We describe below some representative experiences of SCBA members:

- **Pine Tree Cablevision, Pembroke, Maine** — Pine Tree Cablevision provides service in Washington and Hancock Counties, Maine. It has 210 miles of cable plant serving 22 communities from Winter Harbor to Eastport to Princeton. Pine Tree serves 5,500 subscribers. Because of the rural nature of Maine and low customer density, each subscriber pays for roughly 1.2 poles each year. Pine Tree leases pole space from Nynex and Bangor Hydro Service. The following chart illustrates Pine Tree's pole cost history:

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<sup>39</sup> These rates are taken from a 1995 pole rate survey introduced in the recent Michigan pole attachment rate proceeding. MPSC Case No. U-10831.